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VIA EMAIL: Moore.Matthew@epamail.epa.gov
AND U.S. MAIL

J. Matthew Moore
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Office of Regional Counsel
U.S. EPA Region 5 (C-14J)
77 W. Jackson Blvd.
Chicago, IL 60604

Re: CERCLA 104(e) Request for Information Relating to Frederick J. Schroeder's Association with the Milwaukee Die Cast Site

Dear Mr. Moore:

This letter will respond to your email of July 20, 2011 regarding Mr. Schroeder's terminated l[redacted] trust. In responding and discussing statutes or case law concerning potential claims, nothing herein should be regarded as an admission that the decedent, Frederick J. Schroeder, Jr., was a responsible party subject to any such claims.

We disagree with your reading of Wis. Stat. § 701.065. Under Wisconsin trust law, it has never been necessary to publish notice in order to bar claims; publication is permissive and claims are barred whether or not notice is published. In most cases no publication is made – particularly in situations such as Mr. Schroeder's, where the decedent was in a nursing home and inactive for many years (as noted previously, Mr. Schroeder was 100 years old when he died).

In regard to your comment about claims of the United States not being subject to a bar, that assumes there is a claim that could be made and a party with capacity against whom it could be made. As explained below, there is no such party in the current circumstances.

Mr. Schroeder's former revocable trust is not amenable to a claim by the United States or anyone else at this point in time. The trust (the "[redacted]"), which was the vehicle for

administering and distributing Mr. Schroeder's assets following his death, no longer exists and hence cannot be the subject of a claim. The Exemption 6 has been terminated and distributed; it holds no assets and there is no "person" against whom a claim could be made under § 701.065 (if in fact a decedent's formerly revocable trust in the stage of post-death administration constitutes a "person" within the meaning of CERCLA – it does not fall within the definition of "person" under 42 U.S.C. § 9601(21); *see Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.,* 814 F. Supp. 1285, 1291 (E.D. Va. 1993) (analogous to a dead and buried corporation)).

Former trustees may be sued for personal acts of wrongdoing, such as contaminating property under their control. But that is not this case. Indeed, the real property that is the subject of the remediation was never under the control of the former trustees (and never under the control of Mr. Schroeder's beneficiaries, as noted below). The real property at issue was transferred to another corporation many years *before* the trust was even established, and even more years *before* the EPA's first contact regarding the site. Since the decedent's former revocable trust is no longer in existence – *i.e.,* terminated – there is no one with the capacity to be sued and nothing to recover. Chapter 701 of the Wisconsin Statutes, regarding trusts, makes this clear. It defines "Trustee" as follows: "**(8) Trustee.** 'Trustee' means a person holding in trust title to or holding in trust a power over property. 'Trustee' includes an original, added or successor trustee." Wis. Stat. § 701.01(8). The former trustees do not hold title to anything, and they do not hold power over any property. Their job as trustees of Mr. Schroeder's former revocable trust was concluded when they made the final distribution of the assets in that trust in 2010.

The Seventh Circuit was quite clear in *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*, 68 F.3d 1016 (7th Cir. 1995), that there is nothing in CERCLA that overrides Fed. R. Civ. P. 17(b) regarding capacity to be sued, which is governed by state law (here Wisconsin law). While Wis. Stat. § 803.01 recognizes the capacity of trustees to sue (or implicitly to be sued), Ms. Schaffner and JPMorgan are no longer trustees of Mr. Schroeder's 1990 Trust since that trust has been terminated. As such, they are not subject to claims for potential liabilities. I note also that neither § 701.065 nor any other section in Wisconsin's trust statutes includes a provision for transferee liability on the part of trust beneficiaries.

Two other aspects of Wisconsin trust law are important to the analysis as well. The first is Wis. Stat. § 701.07, which establishes the validity of revocable living trusts. Subsection (3) of that section deals specifically with the claims of creditors, providing as follows:

> **(3) Creditors' rights.** If a settlor retains a power to revoke, modify or terminate which is exercisable in the settlor's favor, except when such power is exercisable only in conjunction with a person having a substantial adverse interest, the trust property to the extent it is subject to such power is also subject to the claim of a creditor of the settlor. This subsection shall not apply to trust property to the extent it is exempt from claims of creditors under other statutes.

Wis. Stat. § 701.07(3).

Thus, so long as Mr. Schroeder was living, the [redacted] being revocable and amendable by him, would have been subject to the claims of his creditors. With Mr. Schroeder's death, however, any power by him to revoke or modify the trust terminated. At that point it was the duty of the trustees to administer the trust in accordance with its terms.

That leads to the next point of Wisconsin law, which is relevant to a specific provision of the 1990 Trust instrument, namely paragraph 8, which provides as follows:

> 8. Protective Provisions. This Trust Agreement is intended for the personal protection and welfare of the beneficiaries of the trusts hereunder, and no interest in any trust hereunder shall be susceptible of assignment, anticipation, hypothecation or seizure by legal process.

So-called "spendthrift" provisions like the above-quoted paragraph 8 are enforceable under Wisconsin law. *See* Wis. Stat. § 701.06(1) and (2).

The lack of standing on the part of the former trustees to be sued in a representative capacity, the lack of transferee liability for potential claims under applicable state law, and the enforceable spendthrift provisions of the trust, leave no "person" against whom a claim could be made.

Aside from trust law provisions there is the statute of repose prescribed under Wis. Stat. § 895.046. The statute provides in pertinent part as follows:

> **(5) Limitation on liability.** No manufacturer, distributor, seller, or promoter of a product is liable under sub. (4) if more than 25 years have passed between the date that the manufacturer, distributor, seller, or promoter of a product last manufactured, distributed,

> sold, or promoted the specific product chemically identical to the specific product that allegedly caused the claimant's injury and the date that the claimant's cause of action accrued.

Wis. Stat. § 895.046(5).

The scope of the statute is extremely broad, providing:

> **(2) Applicability.** This section applies to all actions in law or equity in which a claimant alleges that the manufacturer, distributor, seller, or promoter of a product is liable for an injury or harm to a person or property, including actions based on allegations that the design, manufacture, distribution, sale, or promotion of, or instructions or warnings about, a product caused or contributed to a personal injury or harm to a person or property, a private nuisance, or a public nuisance, and to all related or independent claims, including unjust enrichment, restitution, or indemnification.

Wis. Stat. § 895.046(2).

As noted in previous communications, any interest Mr. Schroeder held in Milwaukee Die Casting Company terminated in the mid-1970s, which of course is more than 25 years ago.

The purpose of the statute of repose is to provide some semblance of finality for claims relating to manufacturing. The fact that § 895.046 is a matter of state law and that CERCLA, a federal law, has its own statute of limitations, raises the issue of preemption. A similar issue came before the Second Circuit in *Marsh v. Rosenbloom*, 499 F.3d 165 (2nd Cir. 2007), in which the State of New York sought to recover from Panex Industries, Inc. ("Panex") and its shareholders under CERCLA for environmental response costs incurred in cleaning up a landfill. Penex had been dissolved and, pursuant to the limitations period under applicable Delaware law (Del. Code § 278), the former shareholder defendants asserted that claims against them were barred. The State argued that the trust fund doctrine survived the enactment of Del. Code § 278. The Court of Appeals concluded that the trust fund doctrine did not survive the enactment of § 278; thus, the State's claims against the shareholders were time-barred. The Court of Appeals also concluded that Del. Code § 325(b) barred the State's claims against the shareholders.

The State argued that the six-year CERCLA limitation period of 42 U.S.C. § 9613(g)(2)(B) preempted the briefer Delaware statute of limitations. The Court of Appeals

disagreed, holding that the Delaware law did not conflict with CERCLA or prevent the enforcement of CERCLA's objectives, did not frustrate federal objectives, and did not conflict with federal policy. Significantly, the Court of Appeals concluded that the state law statute of limitations superseded the common law trust fund doctrine.

As demonstrated previously, there is clearly no "covered person" to whom CERCLA liability could possibly attach under the circumstances. CERCLA defines a "person" as:

> [A]n individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. § 9601(21). There is no such entity in existence at this point, and therefore, no possible liability.

Any suggestion that the former co-trustees of the 1 Exemption 6 are derivatively liable under CERCLA for alleged liabilities related to environmental contamination at the Milwaukee Die Casting site would be equally inapposite. District courts in this and other circuits have relied on fact-specific inquiries to determine whether there is a basis to hold a beneficiary liable on a derivative basis under a "trust fund" theory for the environmental liabilities of a decedent. The circumstances surrounding this site are most similar to those cases where the courts have found no basis upon which to hold the beneficiaries liable. Clearly, CERCLA was not intended to reach distributees of the deceased operators of contaminated property who have had no involvement whatsoever in the business or the site at issue.

In one of the more recent decisions to consider liability under the "trust fund" theory, a federal district court in Illinois concluded that where the decedent's estate had been distributed and closed, any assets received by the beneficiary at issue were not subject to the imposition of a trust for the purpose of satisfying the decedent's environmental liabilities under CERCLA. *See Illinois v. Grigoleit Co.,* 104 F. Supp. 2d 967 (C.D. Ill. 2000). In *Grigoleit*, there was no doubt that the decedent/father was an "owner-operator" subject to liability under CERCLA. During the years he operated a facility on the site at issue, he accumulated hundreds of 55-gallon drums containing hazardous substances. The drums, many of which were compromised and leaking, remained on the site at the time of his death and – due at least in part to inaction on the part of the Illinois EPA – for well over a decade thereafter. The father died in 1984, and his estate was fully distributed and closed in 1985. His daughter and her husband received proceeds from the

sale of his house and another parcel, but retained ownership of a third income-producing parcel. The State of Illinois argued that the income-producing property was held "in trust for satisfying [the decedent]'s environmental liabilities." *Id.* at 981. The court held, however, that the beneficiary "cannot be liable based upon a CERCLA trust fund theory *under the facts here*." *Id.* at 982 (emphasis added). The *Grigoleit* court noted with favor the decision in *Norfolk Southern Railway Co. v. Shulimson Bros. Co.*, 1 F. Supp. 2d 553 (W.D.N.C. 1998), where the court "declined to find distributees of two estates accountable under a trust fund theory," instead concluding that "fully distributed and closed estates whose beneficiaries have not been involved in the activities which gave rise to the CERCLA liability by any method other than inheritance are not subject to liability under the statute."' 104 F. Supp. 2d at 982, *quoting Norfolk S. Ry. Co.*, 1 F. Supp. 2d at 558 (W.D.N.C. 1998) (further citations omitted). *Norfolk Southern Railway Co. v. Shulimson Bros. Co., supra,* is another of the more recent cases holding that there is no CERCLA liability for heirs simply because they received an inheritance from deceased partners who, themselves, may have been responsible parties under CERCLA. More compelling facts connecting the beneficiaries to the contaminated site are obviously necessary.

The facts in *Grigoleit* and *Shulimson*, as with the facts relating to Mr. Schroeder's former revocable trust, are in sharp contrast with those in *United States v. Martell*, 887 F. Supp. 1183 (N.D. Ind. 1995), where the district court allowed a CERCLA claim to proceed against a decedent's estate under the "trust fund" theory. In *Martell,* the Government had been pursuing claims against defendant Martell for years. The facts made it clear that Martell was an "operator" subject to liability under CERCLA. Defendant Martell died during the pendency of the litigation. The court permitted the Government to substitute Martell's estate as a party defendant in place of the decedent. *Id.* at 1186. At the same time it permitted substitution of the undistributed estate, the court acknowledged that other courts have refused to hold beneficiaries liable if they were not involved in the activities giving rise to CERCLA liability since they were not "'owners or operators' at the time of contamination, and their only connection with the property was to inherit it from the deceased responsible party." *Id.* at 1188 (citing *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.,* 814 F. Supp. 1285, 1292 (E.D.Va.1993); *Snediker Developers, Ltd. Ptsp. v. Evans,* 773 F. Supp. 984, 987 (E.D.Mich.1991)). The present case is even further removed from the contamination at issue. The company in which Mr. Schroeder was a shareholder and officer conveyed the property in the mid-1970s – hence, such property was never even owned by the [redacted] Trust referred to in prior correspondence, nor was it ever owned or operated by any of the beneficiaries.

Exemption 6

In one of the earlier cases holding there was no CERCLA liability for beneficiaries of an estate, *Chesapeake and Potomac Telephone Co. v. Peck Iron & Metal Co.,* 814 F. Supp. 1285 (E.D. Va.1993), the court considered the question of what constitutes a "person" under CERCLA. In the case, two brothers were general partners involved in a business that sold spent lead acid batteries – operations which brought them into the scope of CERCLA liability. The two partners, however, were deceased when the relevant litigation was commenced, so the plaintiff sued their estates, which had been fully distributed. Neither the estates nor the beneficiaries were successors to the partnership, or involved in the operations of the business following the death of the partners. The court reasoned that it would be "impossible for it to reconcile the caselaw holding that a dead and buried corporation is not a 'person' within the meaning of CERCLA with a finding that a similarly 'dead and buried' estate may, on the other hand, be susceptible to such liability." *Id.* at 1292. Its holding, relied upon by federal courts for nearly 20 years, is directly applicable to the current situation:

> Fully disseminated and closed estates, whose beneficiaries do not remain involved in the decedent's activities which gave rise to CERCLA liability – except by virtue of the inheritance – are not covered under CERCLA and are not subject to liability.

Id. Clearly the connection between the beneficiaries and the contaminated site was far too tenuous for these courts to find a legal basis to hold the beneficiaries responsible under CERCLA.

Indeed, an entire body of environmental defense law has developed under the "innocent landowner" theory pursuant to the defenses delineated in § 107(b)(3) of CERCLA. The statute permits this defense to landowners of contaminated property only when certain circumstances exist, including proactive steps taken by those "innocent landowner" while they owned the land. In the Schroeder case, since the terminated [redacted] Exemption 6 never owned any part of the land itself, the former trustees and former beneficiaries are certainly innocent, and never even rose to the level of landowner. Certainly, the CERCLA statute, which itself provides the "innocent landowner" defense, was never intended to reach innocent parties who never even owned the contaminated property. Thus, the terminated [redacted] Exemption 6 is several steps beyond the reach of the CERCLA statute.

While some courts in other circuits have allowed CERCLA claims to be pursued against trusts or beneficiaries based upon a variety of theories, the facts of those cases are distinguishable from those surrounding the distribution of Mr. Schroeder's assets. Significantly,

the beneficiaries in those cases cannot be considered sufficiently independent of the circumstances giving rise to a CERCLA claim. Rather, those beneficiaries were intimately involved in the business that was the source of the contamination by virtue of serving as officers, directors and employees of the business; in some cases, the beneficiaries could even be considered "owners or operators" themselves. In *North Carolina ex rel. Howes v. W. R. Peele, Sr. Trust,* 876 F. Supp. 733 (E.D.N.C. 1995), the court relied upon the "trust fund" theory to hold the beneficiary of a trust liable under CERCLA. Some assets had devolved to other beneficiaries by inheritance, but the bulk of the assets had flowed into the trust at issue. No claims had even been pursued against the other beneficiaries. Instead, the CERCLA claims were limited to the decedent's wife, who was the income beneficiary, and, notably, had served as an officer and director and even as the president of the company in its final years, assisting her husband, who had become disabled. The court held the trust, itself, derivatively liable under the same theory. In addition to the "trust fund" claims, the court allowed CERCLA claims to proceed against the decedent's wife based upon her status.

The "trust fund" theory likewise formed a basis for the court's decision to permit CERCLA claims against the beneficiaries in *Steego Corp. v. Ravenal,* 830 F. Supp. 42 (D. Mass. 1993). The facts reveal, as in *Howes*, that these beneficiaries were extensively involved in the corporate entities responsible for the contamination as "owners and operators" themselves, as well as officers and/or directors.

In stark contrast are the facts surrounding the former co-trustees of the Schroeder 1990 Trust and its beneficiaries. JPMorgan, of course, is simply a corporate fiduciary. As we related

[redacted]
Exemption 6

any involvement in running the Company. Their circumstances in no way resemble the circumstances of the beneficiaries in cases where the court used a "trust fund" theory to allow CERCLA claims to proceed against those beneficiaries.

The cases described above make it clear that CERCLA was not intended to apply to situations such as those involved in Mr. Schroeder's former revocable trust. Accordingly, neither the former trustees of Mr. Schroeder's revocable trust nor the trust beneficiaries are subject to any potential liability in connection with the former Milwaukee Die Casting Company site.

If you have any questions, please contact me. Thank you for your consideration.

Very truly yours,

Philip J. Halley

PJH/cas

cc: Nathan A. Fishbach